

U.S. Department of Energy
Instrument of Agreement
DE-XX09-XXXXXXXX

Part I – General and Administrative Information

Article 1 - Purpose

The terms and conditions contained in this Instrument of Agreement (“Agreement”) between ***** and the United States Department of Energy (“DOE”) shall govern the Standing List and any resulting Matching Orders to provide independent technical and engineering advisory services to DOE in the evaluation of projects seeking loan guarantees from DOE pursuant to Title XVII of the Energy Policy Act of 2005, Pub. L. 109-58 (“Title XVII”), and 10 Code of Federal Regulation Part 609 (the “Final Regulations”). This Agreement establishes the terms and conditions under which services may be provided by Engineering Consultants as Independent Engineers under a Matching Order, but does not obligate DOE to enter into any Matching Orders for independent technical and engineering advisory services with any Engineering Consultant. All of the terms and conditions in this Agreement shall be incorporated by reference in each Matching Order entered into between DOE and an Independent Engineer. Both DOE and ***** agree that this Agreement is not a contract, basic agreement or a basic ordering agreement under the Federal Acquisition Regulation nor is it a grant or cooperative agreement under 10 CFR 600 or a technology investment agreement under 10 CFR 603. In addition, the Federal Acquisition Regulation does not apply to the Agreement or any Matching Orders. All services required by DOE will be obtained through a Matching Order(s) issued in accordance with the procedures in this Agreement. DOE reserves the right to make future modifications to the processes outlined both in this Agreement and any resulting Matching Orders.

Article 2 - Definitions

10 CFR 600 – The Department of Energy’s financial assistance rules, which do not apply to this Agreement or any Matching Orders.

Applicant – Any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal entity that has submitted an Application (as defined in Section 609.2 of the Final Regulations) to DOE and has the authority to enter into a Loan Guarantee Agreement (as defined in Section 609.2 of the Final Regulations) with DOE.

Best Value – Basis by which an Engineering Consultant on the Standing List will be selected for a Matching Order that will provide the greatest overall benefit to the Government in response to the RSCAP. The SCAP that has been determined to be the most advantageous to DOE considering price and non-price factors will be selected for award. The evaluation criteria for determining best value will be specified in each RSCAP issued by DOE.

Borrower – Any Applicant who enters into a Loan Guarantee Agreement with DOE and issues

Guaranteed Obligations (as defined in Section 609.2 of the Final Regulations).

Engineering Consultant – An Invitee that has been determined to be capable of providing to DOE the services identified in Invitation DE-SS01-08CF00002 and that has signed an Instrument of Agreement. Engineering Consultants on the Standing List will be eligible to compete to provide the services required under Matching Orders.

FAR – The Federal Acquisition Regulation, Title 48 of the Code of Federal Regulations; the FAR does not apply to this Agreement or any Matching Orders.

Independent Engineer – An Engineering Consultant selected by DOE to provide independent technical and engineering advisory services to DOE under a Matching Order for a particular project.

Instrument of Agreement – The written agreement entered into by DOE with each of the Engineering Consultants that contains (1) terms and conditions applying to future Matching Orders between the parties during its term; (2) a description of supplies or services that may be provided; and (3) methods for pricing, issuing, and delivering future Matching Orders. The Instrument of Agreement is not a contract, basic agreement, or basic ordering agreement under the FAR. Entering into an Instrument of Agreement with DOE does not guarantee that the Engineering Consultant will receive a Matching Order.

Invitee - All firms interested in responding to the Invitation DE-SS01-08CF00002 issued July 16, 2008, individually or as a Team.

Matching Order – The written agreement used to place a binding legal relationship between an Independent Engineer and DOE with respect to a particular project. The Matching Order will not provide for payment by DOE for any fees and expenses incurred by an Independent Engineer, in connection with the project. The Independent Engineer and the Project Sponsor and/or Borrower must execute a Sponsor Payment Letter.

Project Sponsor – Any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five (5) percent or greater interest in the proposed Eligible Project (as defined in Section 609.2 of the Final Regulations) or the Applicant.

Request for Statement of Capability, Availability, and Price (“RSCAP”) – a request from DOE that will outline the Matching Order process and contain a description of the specific services being requested for the Matching Order, SCAP submission instructions, and evaluation criteria.

Sponsor Payment Letter – A written agreement between the Independent Engineer and the Project Sponsor and/or Borrower for payment of the services provided to, and expenses incurred on behalf of, DOE under a Matching Order.

Standing List – The standing list is comprised of those Invitees who have submitted Statements of Expertise and Resources in accordance with this Invitation and who have been determined by DOE to be capable of providing to DOE the services identified in this Invitation. Engineering firms will be placed on the Standing List upon execution of an Instrument of Agreement and will become an Engineering Consultant.

Statement of Capability, Availability, and Price (“SCAP”) – Submission by an Engineering

Consultant on the Standing List in response to the RSCAP.

Teaming Arrangements – An arrangement in which two (2) or more engineering firms agree to work jointly and cooperatively as a potential Engineering Consultant. The members of a Teaming Arrangement shall be referred to, individually, as a “Teaming Member” and, collectively, as a “Team.”

Article 3 - Order of Precedence

The Matching Orders will incorporate by reference the required and applicable terms and conditions agreed upon in the Agreement. As applicable, additional terms and conditions may be added to the Matching Order. In the event that a conflict between a Matching Order and an Agreement occurs, the Agreement shall control.

A Sponsor Payment Letter shall be negotiated and executed between an Independent Engineer and a Project Sponsor and/or Borrower that demonstrates creditworthiness acceptable to the Independent Engineer prior to any work being performed by the Independent Engineer under a Matching Order. DOE shall not be a party to the Sponsor Payment Letter under any circumstances.

Article 4 - Duration of Standing List Placement

All Engineering Consultants shall remain on the Standing List until the earlier of (i) an Engineering Consultant provides written notification to the DOE Contracting Officer requesting removal from the Standing List; (ii) DOE eliminates the Standing List; (iii) DOE terminates the Engineering Consultant's Agreement or Matching Order for convenience or cause; or (iv) an Engineering Consultant fails to deliver within 30 days of a request by DOE a certification that the Engineering Consultant continues to have the ability to provide, at a minimum, the services identified in Attachment A, Statement of Work.

Article 5 - Instrument of Agreement Review/Revision

This Agreement shall be reviewed annually, before the anniversary of its effective date and revised as necessary to conform to the current changes in statutes, regulations, Executive Orders, or other appropriate matters.

Article 6 - Multiple Instruments of Agreements

Instruments of Agreements for the services described herein will be established with multiple Engineering Consultants. Matching Orders will be awarded on a competitive basis. DOE shall continue to receive Statements of Expertise and Resources from Invitees after the initial Agreements are established and reserves the right to issue additional Agreements to Invitees.

Article 7 - Availability/Obligation of Funds

No funds will be obligated or made available for this Agreement by DOE. DOE shall have no legal liability for any payment purposes under this Agreement.

Article 8 - Scope of Work

The Engineering Consultant agrees to furnish such services as described in Attachment A as DOE may order under a Matching Order during the term of this Agreement. Any such Matching Order shall become a binding contract upon DOE and the Engineering Consultant entering into a Matching Order. All Matching Orders shall reference the number of this Agreement. The DOE Engineering Consultant Standing List Administrator listed in **Article 11 - Engineering Consultant Standing List Administrator** is available to clarify the understanding of the Agreement.

Article 9 - Delivery/Payment

Work shall be completed and delivered as stated in each individual Matching Order. Payment for completed services will be made in accordance with the Sponsor Payment Letter.

Article 10 - Limitation of Government Liability

DOE's obligation under any Standing List is to use its reasonable efforts to perform in accordance with the Agreement. Under no circumstances shall DOE be liable to an Engineering Consultant as a result of the conduct of a Project Sponsor, a Borrower and/or any of their or DOE's contractors or subcontractors or for indirect, consequential, or special damages arising from its conduct, except as provided in the Agreement; neither shall DOE be liable to an Engineering Consultant for any damages due, in whole or in part, to causes beyond the control and without the fault or negligence of DOE, including but not restricted to, acts of God or public enemies, acts of the U.S. Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

Article 11 - Engineering Consultant Standing List Administrator

DOE Engineering Consultant Standing List Administrator

Name: Richard Bonnell

Telephone number: 202-287-1508

E-mail address: richard.bonnell@hq.doe.gov

Address: U.S. Department of Energy

Headquarters Procurement Services

Division B, MA-642.2

1000 Independence Avenue, S.W.

Washington, D.C. 20585-1615

Engineering Consultant's Standing List Administrator

Name: XXX

Telephone number: XXX

E-mail address: XXX

Address: XXX

Each Engineering Consultant is responsible for ensuring that the information for its Standing List Administrator is up to date.

Article 12 - Modification Authority

Notwithstanding any of the other Articles of this Agreement, the Contracting Officer shall be the only individual authorized to modify any term or condition of the Agreement and any resulting Matching Orders.

Article 13 - Termination of Instrument of Agreement for Convenience or Cause

Termination for the Government's Convenience. The Government reserves the right to terminate this Agreement, or any part thereof, for its sole convenience. Due to the no cost nature of the Agreement and any resulting Matching Order, the Government does not owe the Engineering Consultant any amounts due under a Sponsor Payment Letter if the Agreement is terminated for convenience.

Termination for Cause. The Government may terminate this Agreement, or any part hereof, for cause in the event of any default by the Engineering Consultant or if the Engineering Consultant fails to comply with any of the Agreement's terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Engineering Consultant for any amounts due under a Sponsor Payment Letter, and the Engineering Consultant shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for cause, such termination shall be deemed a termination for the Government's convenience.

Article 14 - Central Contractor Registration

The Central Contractor Registration (CCR) is the primary registrant database for the U.S. Federal Government. All Engineering Consultants selected by DOE are required to register in the CCR database prior to executing this Agreement. Engineering Consultants may obtain information on registration and annual confirmation requirements via the internet at <http://www.ccr.gov> or by calling 1-888-227-2423, or 269-961-5757.

Article 15 - Matching Order Process

(a) General

As Applications for loan guarantees submitted in response to DOE solicitations are received and reviewed by DOE, DOE contemplates retaining Engineering Consultants to serve as DOE's Independent Engineers advising in the work areas set forth in the Statement of Work, Attachment A, on one (1) or more projects, as applicable.

DOE will conduct a competitive process of matching an Engineering Consultant as an Independent Engineer (1) with a loan guarantee project and/or (2) for specific work areas identified in an RSCAP.

(b) Request for Statements of Capability, Availability, and Price

The Contracting Officer will provide Engineering Consultants the opportunity to participate in each Matching Order process. The Contracting Officer or his/her designated representative shall submit a Request for Statements of Capability, Availability, and Price ("RSCAP") to all Engineering Consultants on the Standing List. The RSCAP may be issued to the Engineering Consultant's Standing List Administrator listed in **Article 11 - Engineering Consultant Standing List Administrator** via facsimile, electronic mail or any other means the Contracting Officer or his/her designated representative deems appropriate. The RSCAP will outline the Matching Order process and contain a description of the specific services being requested for the Matching Order, submission instructions, and evaluation criteria. The Contracting Officer may use streamlined procedures for the competitive Matching Order process, including oral presentations. Engineering Consultants shall submit Statements of Capability, Availability, and Price ("SCAP") in accordance with the instructions provided in the RSCAP. An Engineering Consultant on the Standing List that responds to an RSCAP will be required to submit a disclosure of conflicts of interest statement along with its SCAP.

(c) Evaluation

The RSCAP will outline the evaluation factors that will be used when making a Matching Order decision, which may include, but is not limited to the Engineering Consultant's experience and capabilities, past performance, availability, staffing, and price. DOE will also conduct a conflicts of interest review based on the disclosure of conflicts of interest statement submitted by an Engineering Consultant with respect to a Project Sponsor and/or Borrower.

(d) Selection

In accordance with the competitive criteria specified in a RSCAP, DOE will select an Independent Engineer representing the best value to DOE to provide the needed services with respect to a project. A Matching Order will be issued to the Engineering Consultant whose SCAP is the most advantageous to DOE while offering the best value considering price and non-price factors, as applicable. Independent Engineers will be required to execute conflicts of interest and nondisclosure acknowledgments prior to performing any work under a Matching Order.

The terms and conditions included in this Agreement shall apply to all Matching Orders placed with Engineering Consultants on the Standing List.

Article 16 - Organizational Conflicts of Interest

Each Engineering Consultant responding to an RSCAP will be required to submit a disclosure of conflicts of interest statement along with its SCAP. An Independent Engineer has a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest.

1) An organizational conflict of interest (“OCI”) means that because of other activities and relationships with other persons, a person is unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage.

It is not the intention of DOE to prevent an Engineering Consultant from participating in a competitive Matching Order process due to a perceived OCI. DOE Contracting Officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances.

2) Potential organizational conflict of interest. The following examples illustrate situations in which questions concerning OCI may arise. They are not all inclusive.

(a) Unequal access to information. Access to “nonpublic information” as part of the performance of a Matching Order could provide an Independent Engineer a competitive advantage in a later competition for another Matching Order or contract. Such an advantage could easily be perceived as unfair by a competing Engineering Consultant who is not given similar access to the relevant information. If the requirements of the Matching Order anticipate the potential Independent Engineer may have access to nonpublic information, the potential Independent Engineer should be required to submit and negotiate an acceptable mitigation plan.

(b) Biased ground rules. In the course of performing a Matching Order, an Independent Engineer has in some fashion established important “ground rules” for another Matching Order or contract, where the same Independent Engineer may be a competitor. For example, an Independent Engineer may have drafted the statement of work, specifications, or evaluation criteria of a future DOE procurement. DOE’s primary concern in this case is that an Independent Engineer so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competing vendors. If the requirements of the Matching Order indicate the potential Independent Engineer may be in a position to establish, or may have important ground rules, including but not limited to those described herein, the potential Independent Engineer should be required to submit and negotiate an acceptable mitigation plan.

(c) Impaired objectivity. In the course of performing a Matching Order, an Independent Engineer is placed in a situation of providing assessment and evaluation findings over itself, or another business division, or subsidiary of the same corporation, or other entity with which it has a significant financial relationship. DOE’s concern in this case is that the Independent Engineer’s ability to render impartial advice to DOE could appear to be undermined by the Independent Engineer’s financial or other business relationship to the entity whose work product is being assessed or evaluated. In these situations, a “walling off” of lines of communication may well be insufficient to remove the perception that the objectivity of the contractor has been tainted. If the requirements of the Matching Order indicate that the potential Independent Engineer may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entities with which it

has a significant financial relationship, the affected Engineering Consultant should provide a mitigation plan that includes recusal by the Engineering Consultant from the affected Matching Order. Such recusal might include divestiture of the work to another third-party Engineering Consultant.

3) Disclosure by Engineering Consultants responding to an RSCAP:

(a) Engineering Consultants should provide information which concisely describes all relevant facts concerning any past, present or currently planned interests (financial, contractual, organizational, or otherwise) relating to the work to be performed under a Matching Order and bearing on whether an Engineering Consultant has a possible OCI.

(b) If the Engineering Consultant does not disclose any relevant facts concerning an OCI, the Engineering Consultant, by submitting a SCAP or signing a Matching Order, warrants that to its best knowledge and belief no such facts exist relevant to possible OCI.

(c) An Independent Engineer has a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest. If an Independent Engineer learns of such conflict, the Independent Engineer is expected to report it immediately to the Contracting Officer and perform no more duties under the Matching Order until the Independent Engineer receives instructions on the matter.

4) Remedies for Nondisclosure. The following are possible remedies if an Engineering Consultant refuses to disclose, or misrepresents, any information regarding a potential OCI:

(a) Refusal to provide adequate information may result in disqualification for issuance of a Matching Order.

(b) Nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the Engineering Consultant for issuance of a Matching Order.

(c) Termination of the Matching Order, if the nondisclosure or misrepresentation is discovered after a Matching Order has been issued.

(d) Disqualification from subsequent Matching Orders or contracts or revocation by DOE of such Engineering Consultant's placement on the Standing List.

(e) Other remedial action as may be permitted or provided by all applicable laws or in the Matching Order.

Part II – Matching Order Terms and Conditions

Article 17 - Items Being Acquired

The Independent Engineer shall furnish all personnel, facilities, equipment, materials, supplies, and services necessary as described in the Matching Order. DOE, in accordance with the procedures outlined herein, will direct specific detailed performance requirements (including any necessary reporting requirements) in the Matching Order.

Article 18 - Availability/Obligation of Funds

No funds will be obligated or made available for any Matching Orders by DOE. DOE shall have no legal liability for any payment purposes under this Matching Order.

Article 19 - Limitation of Liability

DOE's obligation under any Matching Order is to use its reasonable efforts to perform in accordance with the terms and conditions of the Matching Order. Under no circumstances shall DOE be liable to an Independent Engineer as a result of a Project Sponsor, a Borrower, and/or any of their or DOE's contractors or subcontractors for indirect, consequential, or special damages arising from such conduct, except as provided by a Matching Order; neither shall DOE be liable to an Independent Engineer for any damages due in whole or in part to causes beyond the control and without the fault or negligence of DOE, including but not restricted to, acts of God or public enemies, acts of the U.S. Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

Article 20 - Indemnification

DOE is limited by the Anti-deficiency Act from undertaking to pay any amounts that are not specifically obligated. Accordingly, DOE may not provide open-ended indemnities or agreements to reimburse third-party costs to any person. An Independent Engineer shall always exclude DOE as an indemnifying party.

Article 21 - Responsibilities of the Parties

(a) Each Matching Order constitutes a contract between the Independent Engineer and DOE. In consideration of the performance under each Matching Order, the Independent Engineer shall be paid the consideration identified in the Sponsor Payment Letter, which consideration shall constitute complete payment for all services furnished and accepted pursuant to the Matching Order.

(b) Fees and expenses incurred by an Independent Engineer in connection with services it renders to DOE pursuant to a Matching Order shall be payable only by the Project Sponsor and/or the Borrower under all circumstances, without recourse to DOE by the Independent Engineer, Project Sponsor, or Borrower. A Sponsor Payment Letter shall be negotiated by the Independent Engineer with the Project Sponsor and/or Borrower and shall be executed by the

Project Sponsor and/or Borrower and the Independent Engineer prior to any work being performed by the Independent Engineer under the Matching Order; execution of the Sponsor Payment Letter by the Independent Engineer shall indicate acceptance by the Independent Engineer of the creditworthiness of the Project Sponsor and/or Borrower executing such Sponsor Payment Letter.

(c) DOE will proceed with evaluating and processing a loan guarantee application only upon a Project Sponsor's entering into a Sponsor Payment Letter with an Independent Engineer selected through a competitive Matching Order process by DOE to provide services to DOE on the Project Sponsor's project. The Sponsor Payment Letter shall be subject to review by DOE for the purposes of assuring that DOE is not in any way liable for the payment of any fees and expenses specified and for conformity with other applicable guidelines. A Matching Order may be terminated by DOE for convenience or cause in accordance with **Article 53 - Termination for Convenience or Cause** if a Sponsor Payment Letter is not executed. In the event that a Project Sponsor fails to comply with the provisions of such Sponsor Payment Letter, DOE may stop work on the Project Sponsor's Application, reject the Project Sponsor's Application and/or order, through DOE's Contracting Officer, the Independent Engineer to stop work on the project.

(d) Notwithstanding the payment obligation of the Project Sponsor and/or Borrower with regard to the services rendered and expenses incurred by an Independent Engineer in connection with a Matching Order, DOE is the Independent Engineer's sole client. Each Independent Engineer shall specifically disclaim or cause to be disclaimed any inference of confidential, fiduciary or other client relationship between the Project Sponsor or Borrower of a given project and the Independent Engineer, as a result of the Sponsor Payment Letter or payments made by the Project Sponsor and/or Borrower in accordance with the Sponsor Payment Letter, and shall not allow the Project Sponsor or Borrower to interfere with DOE's relationship with the Independent Engineer, including DOE's ability, in its sole discretion, to terminate such Independent Engineer.

(e) The Independent Engineer will provide DOE statements identifying in detail the work performed by task or document, as applicable, during the relevant period, the total time billed as a firm and by each employee, subcontractor or consultant assigned by the Independent Engineer to work on the Matching Order, as well as aggregate amounts incurred to date for the purpose of correctness and completeness verification of these statements, as well as for redacting any privileged client information, prior to submitting these statements or any invoices to the Project Sponsor and/or Borrower.

Article 22 - Sponsor and/or Borrower Payment Letter ("Sponsor Payment Letter")

DOE shall not be financially liable to the Independent Engineer for any services rendered or expenses incurred in connection with a Matching Order pursuant to a Sponsor Payment Letter under any circumstances whatsoever, including whether a loan guarantee application is approved or a closing occurs or under circumstances in which the Project Sponsor or Borrower fails to pay such fees and expenses. The Sponsor Payment Letter shall incorporate the following provisions and shall be submitted to DOE prior to execution to confirm conformity with this Article.

(a) DOE will not be responsible for any of the Independent Engineer's fees and expenses attributable to representing DOE in connection with the project, including post-closing issues and DOE requirements, and the Independent Engineer agrees that it shall look only to the Project Sponsor and/or Borrower, for payment of such fees and expenses. The

Project Sponsor and/or Borrower is responsible for payment of all fees of and expenses associated with the Independent Engineer under all circumstances, without recourse to DOE by the Independent Engineer, the Project Sponsor, or Borrower.

(b) The Independent Engineer will provide DOE statements identifying in detail the work performed by task or document, as applicable, during the relevant period, the total time billed as a firm and, as applicable, by each employee, subcontractor or consultant assigned by the Independent Engineer to work on the Matching Order, as well as aggregate amounts incurred to date for the purpose of correctness and completeness verification of these statements, prior to submitting these statements or any invoices to the Project Sponsor and/or Borrower.

(c) The Independent Engineer will provide to DOE, prior to presentment to the Project Sponsor and/or Borrower, invoices so that they can be reviewed by DOE with a view to possible redaction of privileged, sensitive, or confidential information.

(d) Notwithstanding the Project Sponsor and/or Borrower's payment obligation to the Independent Engineer with regard to the services rendered and expenses incurred as Independent Engineer, the client relationship is solely between DOE, as the client, and the Independent Engineer. There shall be no inference of confidentiality, fiduciary, or other client relationship between the Independent Engineer and the Project Sponsor and/or Borrower, as a result of the Sponsor Payment Letter or payments made in accordance with the terms of the Sponsor Payment Letter by the Project Sponsor and/or Borrower. The parties to the Sponsor Payment Letter shall disavow any confidentiality, fiduciary or other client relationship. Additionally, the Project Sponsor and/or Borrower shall also not interfere with DOE's relationship with the Independent Engineer. The parties to the Sponsor Payment Letter shall affirm that no one, including the Project Sponsor and/or Borrower, shall interfere with the client relationship between DOE, as the client, and the Independent Engineer.

(e) The Sponsor Payment Letter shall be subject to review for the purposes of assuring that DOE is not in any way liable for the payment of any fees and expenses. The parties to the Sponsor Payment Letter acknowledge that they will not amend, modify, alter, or change in any way this Sponsor Payment Letter prior to notifying DOE and submitting any amendment, modification, alteration, or change to the Sponsor Payment Letter to DOE.

A sample Sponsor Payment Letter is attached as Attachment B. Attachment B is attached merely for illustrative purposes. Each Sponsor Payment Letter shall be negotiated between an Independent Engineer and Project Sponsor and/or Borrower. DOE does not make any representations as to the validity and/or the enforceability of the language in such sample.

Article 23 - Term of Matching Order

The term of this Matching Order is months after the effective date of this Matching Order.

Article 24 - Exercise of Option(s)

DOE has included an option(s) to purchase additional services and to extend the term of this

Matching Order. In order to demonstrate the value it places on quality performance, DOE has provided a mechanism for continuing a contractual relationship with a successful Independent Engineer that performs at a level which meets or exceeds quality performance expectations as communicated to the Independent Engineer, in writing by the Contracting Officer or designated representative. When deciding whether to exercise the option, the Contracting Officer will consider the quality of the Independent Engineer's performance under this Matching Order.

Article 25 - Delivery and Performance Schedule

The Independent Engineer shall comply with the delivery and performance schedule set forth in each Matching Order and in accordance with the Statement of Work.

Article 26 - Principal Place of Performance

As specified in each Matching Order.

Article 27 - Statement of Work

Each Matching Order shall contain a detailed Statement of Work, including specific deliverables.

Article 28 - Reporting Requirements

Reporting Requirements will be contained in each RSCAP and any resulting Matching Order.

Article 29 - Marking

Each package, report, or other deliverable shall be accompanied by a letter or other document which:

- (1) Identifies the Matching Order by number under which the item is being delivered;
- (2) Identifies the deliverable Item Number or Reporting Requirement that requires the delivered item(s); and
- (3) Indicates whether the Independent Engineer considers the delivered item to be a partial or full satisfaction of the requirement.

Article 30 - Inspection and Acceptance

The Contracting Officer or the duly appointed representative will perform inspection and acceptance of services to be provided. The services shall be of the professional level and reflect expertise commensurate with standard commercial or industrial practice for activities of those required under a Matching Order and shall be suitable for their intended purpose. DOE has the right to inspect and test all services and deliverables called for by the Matching Order, to the extent practicable at all times and places during the term of the Matching Order.

In the event of rejection of any report or deliverable, the Independent Engineer shall be notified in writing and shall have ten (10) working days, unless otherwise specified by DOE, from the

date of issuance of such notification to correct the deficiencies and resubmit the report/deliverable. When the defects in services cannot be corrected by reperformance, DOE may require the Independent Engineer to take necessary action to ensure that future performance conforms to Matching Order requirements;

For the purpose of this Article, [_____] is the authorized representative of the Contracting Officer.

Article 31 - Stop Work Order

(a) The Contracting Officer may, at any time including if the Project Sponsor or Borrower fails to make payments under the Sponsor Payment Letter, by written order to the Independent Engineer, require the Independent Engineer to stop all, or any part, of the work called for by this Matching Order for a period of 90 days after the order is delivered to the Independent Engineer, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this Article. Upon receipt of the order, the Independent Engineer shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is delivered to the Independent Engineer, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

- (1) Cancel the stop-work order; or
- (2) Terminate the work covered by the order as provided in the Termination for Convenience or Cause Article contained in the Matching Order.

(b) If a stop-work order issued under this Article is canceled or the period of the order or any extension thereof expires, the Independent Engineer shall resume work. The Contracting Officer shall adjust the delivery schedule, as necessary, and the Matching Order shall be modified, in writing, accordingly, if—

- (1) The stop-work order results in an increase in the time required for the performance of any part of this Matching Order; and
- (2) The Independent Engineer requests an adjustment to the delivery schedule within 30 days after the end of the period of work stoppage.

(c) If a stop-work order is not canceled and the work covered by the Matching Order is terminated by DOE for the convenience or cause, in accordance with **Article 53 - Termination for Convenience or Cause**, due to the no cost nature of the Matching Order, the Government does not owe the Independent Engineer any amounts due under a Sponsor Payment Letter.

Article 32 - Correspondence Procedures

All correspondence submitted by the Independent Engineer (except for invoices and reports) shall be subject to the following procedures:

(a) Technical correspondence. Technical correspondence concerning performance of this Matching Order shall be addressed to:

Name: XXX

Telephone number: XXX

E-mail address: XXXX

Address: XXXX

(b) Non-technical administrative correspondence. All correspondence, other than technical correspondence, shall be addressed to:

Name: XXX

Telephone number: XXX

E-mail address: XXXX

Address: XXXX

(c) Subject line(s). All correspondence shall contain a subject line commencing with the Matching Order number (as specified in each order), as illustrated below:

“SUBJECT: Matching Order No. [insert number], [insert subject topic, *e.g.*, “Deliverables Under Task # 2”).”

Article 33 - Contracting Officer’s Representative

A Contracting Officer’s Representative (COR) will be designated for each Matching Order in order to represent the Contracting Officer in the technical phases of the work. The COR is not authorized to change any of the terms and conditions of the Matching Order. Changes in the Matching Order will be made only by the Contracting Officer only by properly written modification(s) to the Matching Order. Additional Contracting Officer’s Representative(s) for other purposes as required may be designated by the Contracting Officer.

Article 34 - Matching Order Administration

Each Matching Order issued under this Agreement will identify the individuals who will administer the Matching Order.

Article 35 - Type of Matching Order

The Government anticipates awarding Matching Orders on either a labor-hour, time-and-materials or fixed-price basis or some combination thereof. Specific pricing instructions will be contained in the RSCAP.

Article 36 - Technical Direction

(a) Performance of the work under this Matching Order shall be subject to technical direction of the Contracting Officer's Representative identified in the Matching Order, and the Contracting Officer. The term technical direction includes:

- (1) Direction to the Independent Engineer which assists him in accomplishing the Statement of Work; and
- (2) Comments on and approval of reports or other deliverables.

(b) Technical direction must be within the scope of work covered by the Matching Order. The Contracting Officer's Representative does not have the authority to issue technical direction which

- (1) institutes additional work outside the scope of the Matching Order;
- (2) constitutes a change as defined in the "Changes" Article;
- (3) causes an increase or decrease in the total Matching Order effort or time required for Matching Order performance;
- (4) alters the period of performance under the Matching Order;
- (5) interferes with the Independent Engineer's right to perform the terms and conditions of the Matching Order; or
- (6) changes any of the other express terms or conditions of the Matching Order.

(c) All technical directions should be issued in writing by the COR for the applicable Matching Order, time permitting. When a short turnaround is required, the COR may issue technical directions orally. Any oral direction shall be followed by written direction within 24 hours.

(d) The Independent Engineer shall proceed promptly with the performance of technical directions duly issued by the COR in the manner prescribed in this Article and within his/her authority under the provisions of this Article. If, in the opinion of the Independent Engineer, any instruction or direction by the COR falls within one of the categories defined in paragraph (b)(1) through (b)(6) above of this Article, the Independent Engineer shall not proceed but shall notify the Contracting Officer in writing within five (5) working days after receipt of any such instructions or direction and shall request the Contracting Officer to modify the Matching Order accordingly. Upon receiving the notification from the Independent Engineer, the Contracting Officer shall:

- (1) Advise the Independent Engineer in writing within 30 days after receipt of the Independent Engineer's letter that the technical direction is within the scope of the Matching Order effort and does not constitute a change under the "Changes" Article of the Matching Order;
- (2) Advise the Independent Engineer within 30 days after receipt of the Independent Engineer's letter not to perform under the direction and cancel the direction; or
- (3) Advise the Independent Engineer in writing within a reasonable time that DOE will issue a written modification to the Matching Order.

(e) A failure of the Independent Engineer and the Contracting Officer to agree that the technical direction is within the scope of the Matching Order, or a failure to agree upon the Matching Order action to be taken with respect thereto shall be subject to the provisions of **Article 52** entitled "Disputes."

Article 37 - Nonpersonal Services

The services to be provided under each Matching Order are nonpersonal services. It is understood and agreed that the Independent Engineer and its employees, subcontractors, and consultants :

1. Shall perform the services specified herein as independent contractors, not as employees of the Government,
2. Shall be responsible for their own management and administration of the work required, and bear sole responsibility for complying with all technical, schedule, or financial requirements or constraints attendant to the performance of each Matching Order,
3. Shall be free from any direct or indirect supervision or control by any Government employee; however,
4. Shall, pursuant to the government rights under Articles such as "Inspection and Acceptance" and "Key Personnel" comply with such general direction of authorized Government employees as is necessary and appropriate to ensure accomplishment of the contract requirements and objectives.

Each employee of the Independent Engineer must be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by Alien Registration Receipt Card Form I-151, or who presents other evidence from the U.S. Citizenship and Immigration Services that employment will not affect his/her immigration status.

Article 38 - Quality Assurance System

In the conduct of the work performed on the Matching Orders placed under this Agreement, the Independent Engineer agrees to establish and/or maintain an acceptable quality assurance system. If requested by the Contracting Officer, a quality assurance plan shall be submitted to DOE for approval. Any subcontracts or consulting agreements in support of the work under a Matching Order shall require subcontractors and consultants to comply with the Independent Engineer's quality assurance system.

Article 39 - Changes

(a) The Contracting Officer may at any time, by written order, make changes within the general scope of this Matching Order in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

(b) If any such change causes an increase or decrease in the time required for, performance of any part of the work under this Matching Order, whether or not changed by such written order, the Contracting Officer shall make an adjustment in the delivery schedule, and shall modify the Matching Order.

(c) The Independent Engineer must assert its right to an adjustment under this Article within 30 days from the date of receipt of the written order.

(d) Failure to agree to any adjustment shall be a dispute under **Article 52 - Disputes**. However, nothing in this Article shall excuse the Independent Engineer from proceeding with the Matching Order as changed.

Article 40 - Record Retention and Access to Records

(a) Recordkeeping

Engineering Consultants must keep records related to the Agreement for a period of six (6) years after submission of its SCAP in response to a given RSCAP, except for records related to an audit, claim, or dispute that begins but does not reach its conclusion within the Agreement period, which must be kept until the matter is resolved and final action taken.

Independent Engineers must keep records related to this Matching Order for one (1) year after the guaranteed portion of the Guaranteed Obligation (as defined in Section 609.2 of the Final Regulations) (the "Retention Period") is paid in full, except for records related to an audit, claim, or dispute that begins but does not reach its conclusion by the end of the Retention Period, which must be kept until the matter is resolved and final action taken.

(b) Access

The DOE Contracting Officer, the DOE Inspector General, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to books, documents, papers, or other records of the Engineering Consultant and Independent Engineers that are pertinent to the Agreement or Matching Order in order to perform audits. Such audit, examination, or access shall be performed at reasonable times during business hours on business days upon prior written notice and shall be subject to the security requirements of the audited party.

Article 41 - Special Conflicts of Interest Obligation under Matching Order

Prior to the issuance of a Matching Order, each Independent Engineer will be required to execute a conflicts of interest and nondisclosure acknowledgement. This acknowledgement will contain a special conflicts of interest obligation such as the following:

Each Independent Engineer to DOE on a project will provide in writing an agreement not to perform any work for any of the Project Sponsors and/or Borrower identified in the Matching Order, and any of its affiliates or corporate divisions, that relates to services being performed under the Matching Order, until the earlier of (a) approval of such work by the Contracting Officer or (b) two (2) years after (i) the completion of the work required by the Matching Order or (ii) the termination of a Matching Order.

The Independent Engineer to DOE on a project providing engineering services to DOE pursuant to a Matching Order shall generally not perform work on behalf of any party, other than DOE, in connection with any other project for which DOE may evaluate (including services in connection with an Application or prospective Application), has evaluated, or has issued a loan guarantee. However, the Independent Engineer may work for such an entity and/or its affiliates if (1) the Independent Engineer's work for that entity and/or its affiliates is unrelated to the services provided under its existing Matching Order with DOE; (2) the Independent Engineer obtains a waiver of conflicts from that entity and/or its affiliate; and (3) the Independent Engineer obtains written approval of the Contracting Officer prior to accepting such work.

Article 42 - Organizational Conflicts of Interest Representation

The Independent Engineer warrants that, to the best of its knowledge and belief, there are no relevant facts or circumstances which could give rise to an organizational conflict of interest ("OCI") or that the Independent Engineer has disclosed all such relevant information.

The Independent Engineer agrees that if an actual or potential OCI is discovered after award, the Independent Engineer shall make a full disclosure in writing to the Contracting Officer. The disclosure shall include a mitigation plan describing actions the Independent Engineer has taken or proposed to take, to avoid, mitigate, or neutralize the actual or potential conflict. Changes in the Independent Engineer's relationships due to mergers, consolidations or any unanticipated circumstances may create an unacceptable organizational conflict of interest might necessitate such disclosure.

DOE reserves the right to review and audit OCI mitigation plans as needed after award, and to reject mitigation plans if the OCI, in the opinion of the Contracting Officer cannot be avoided, or mitigated.

The Contracting Officer may terminate this Matching Order for convenience in whole or in part, if it deems such termination necessary to avoid an OCI. If the Independent Engineer was aware of a potential OCI prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the Contracting Officer, the Government may terminate this Matching Order for default, debar the Independent Engineer from government contracting, or pursue such other remedies as may be permitted by law or this Matching Order.

The Independent Engineer further agrees to insert provisions which shall conform substantially to the language of this Article in any subcontract, consultant or teaming agreement hereunder.

Article 43 - Confidentiality

An Independent Engineer may be required to access confidential or proprietary business, technical, or financial information belonging to the U.S. Government or other entities, including the Project Sponsor and/or Borrower. Each Independent Engineer is subject to the following obligation of nondisclosure of confidential information:

1) Under a Matching Order, an Independent Engineer may be required to access confidential or proprietary business, technical, or financial information belonging to the U.S. Government or other entities. Such information shall be treated as confidential and the Independent Engineer agrees not to appropriate such information to its own use or disclose such information to third parties unless specifically authorized by the Contracting Officer in writing. The foregoing obligations, however, shall not apply to:

- Information which, at the time of receipt, is in the public domain; Information which is published after receipt or otherwise becomes part of the public domain through no fault of the Independent Engineer;
- Information which the Independent Engineer can demonstrate was in its possession at the time of receipt thereof and was not acquired directly or indirectly from the U.S. Government or other entities; Information which the Independent Engineer can demonstrate was received by it from a third party that did not require the Independent Engineer to hold it in confidence.

2) The Independent Engineer shall obtain the written agreement, in a form satisfactory to the Contracting Officer, of each of its employees, subcontractors and/or consultants, permitted access, whereby the employee, subcontractor and/or consultant agrees that he will not discuss, divulge or disclose any such information or data to any person or entity except those persons within the Independent Engineer's organization directly concerned with the applicable Matching Order.

3) The Independent Engineer agrees, if requested by DOE, to sign an agreement identical, in all material respects, to the provisions of this Article, with each entity supplying information to the Independent Engineer for purposes of an applicable Matching Order, and to supply a copy of such agreement to the Contracting Officer. From time to time upon request of the Contracting Officer, the Independent Engineer shall supply DOE with reports itemizing information received as confidential or proprietary and setting forth the entity or entities from which the Independent Engineer received such information.

4) The Independent Engineer agrees that upon request by DOE it will execute a DOE-approved agreement with any party whose facilities or proprietary data it is given access to or is furnished, restricting use and disclosure of the data or the information obtained from the facilities. Upon request by DOE, such an agreement shall also be signed by the Independent Engineer.

5) The Independent Engineer further agrees to insert provisions which shall conform substantially to the language of this Article in any subcontract, consultant or teaming agreement hereunder

Article 44 - Data Rights

Each Matching Order will contain specific work requirements and deliverables, subject to the rights in data obligations as follows:

1) Definitions

“Data” means recorded information regardless of form or the medium on which it may be recorded. The term includes technical data and computer software and information of a commercial or financial nature received from third parties. The term does not include information incidental to administration of a Matching Order, such as financial, administrative, cost or pricing or management information for the Matching Order.

“Unlimited Rights” means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

“Proprietary Data” means data developed at private expense and that embody trade secrets, or are commercial or financial and confidential or privileged.

2) DOE shall have:

- (a) Unlimited Rights in all Data delivered under a Matching Order, and in all Data first produced in the performance of a Matching Order, except as provided in paragraph 3) of this Article for copyright and except as provided with respect to Proprietary Data;
- (b) The right to limit exercise of claim to copyright in Data first produced in the performance of this Matching Order, and to obtain assignment of copyright in such Data, in accordance with subparagraph 3)(a) of this Article ;
- (c) The right to limit the release and use of certain Data in accordance with paragraph 4) of this Article; and
- (d) The right to have all Data first produced or specifically used in the performance of a Matching Order delivered to DOE, either as the Contracting Officer may from time to time direct during the performance of the Matching Order or upon completion or termination of the Matching Order.

3) Copyright

- (a) Data first produced in the performance of this Matching Order:
 - (i) The Independent Engineer agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any Data first produced in the performance of a Matching Order.
 - (ii) If DOE desires to obtain copyright in Data first produced in the performance of a Matching Order, the Contracting Officer may direct the Independent Engineer to establish, or authorize the establishment of claim to copyright in such Data and to assign, or obtain the assignment of, such copyright to DOE or its designated assignee.
- (b) Data not first produced in the performance of this Matching Order:

The Independent Engineer shall not, without prior written permission of the Contracting Officer, incorporate in Data delivered under this Matching Order any data not first produced in the performance of this Matching Order and which contain the copyright notice of 17 U.S.C. 401 or 402, unless the Independent Engineer identifies such Data and grants to the Government, or acquires on its behalf, a paid-up nonexclusive, irrevocable, worldwide license for all such Data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

4) Release and Use Restrictions

Except as otherwise specifically provided for in a Matching Order, the Independent Engineer shall not use for purposes other than the performance of a Matching Order, nor shall the Independent Engineer release, reproduce, distribute, or publish any Data first produced or specifically used in the performance of the Matching Order, nor authorize others to do so, without written permission of the Contracting Officer.

5) Indemnity

The Independent Engineer shall indemnify DOE and its officers, agents, and employees acting for DOE against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this Matching Order; or any libelous or other unlawful matter contained in such Data.

6) Right to Inspect

The Independent Engineer agrees, except as may be otherwise specified in a Matching Order for specific Data items listed as not subject to this provision, that the Contracting Officer or an authorized representative may, up to three (3) years after acceptance of all items to be delivered under the Matching Order inspect at the Independent Engineer's facility any Data used in the performance of the Matching Order and not delivered.

7) Restrictive Markings

The Independent Engineer agrees that to the extent it receives or is given access to Data necessary for the performance of a Matching Order and which contain restrictive markings, the Independent Engineer shall treat the Data in accordance with such markings. It is recognized that the Independent Engineer will be given access to Data by DOE that is considered to be confidential or proprietary by the provider. The Independent Engineer will use its best efforts to identify in Data delivered to DOE, Data first produced by the Independent Engineer that embodies and discloses such Data of a provider.

Article 45 - Notification of Changes

(a) Definitions. "Contracting Officer," as used in this Article, does not include any representative of the Contracting Officer. "Contracting Officer's Representative ("COR")," as used in this Article, means any person the Contracting Officer has so designated by written notice which shall refer to this subparagraph and shall be issued to the designated representative before the COR exercises such authority.

(b) Notice. The primary purpose of this Article is to obtain prompt reporting of Government conduct that the Independent Engineer considers to constitute a change to this Matching Order. Except for changes identified as such in writing and signed by the Contracting Officer, the Independent Engineer shall notify the Contracting Officer in writing promptly, within 15 calendar days from the date that the Independent Engineer identifies any Government conduct (including actions, inactions, and written or oral communications) that the Independent Engineer regards as a change to the Matching Order terms and conditions. On the basis of the most accurate information available to the Independent Engineer, the notice shall state –

- (1) The date, nature, and circumstances of the conduct regarded as a change;
- (2) The name, function, and activity of each Government individual and Independent Engineer official or employee involved in or knowledgeable about such conduct;
- (3) The identification of any documents and the substance of any oral communications involved in such conduct; and
- (4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose.

Article 46 - Incorporation of Independent Engineer's Statement of Capability, Availability, and Price

The Independent Engineer's Statement of Capability, Availability, and Price (SCAP), dated [_____] is made part of this Matching Order. In the event of any inconsistency between the provision of this Matching Order and the Independent Engineer's SCAP, the Matching Order provisions take precedence.

Article 47 - Subcontract Consent

A subcontract means any contract or agreement entered into by a subcontractor with an Independent Engineer to furnish supplies or services for performance of the Matching Order. The Contracting Officer's consent is required for all subcontracts. In proposing a subcontractor the Independent Engineer shall include a description of the proposed subcontract, the identity of the proposed subcontractor including the proposed personnel, and a price proposal. Prior to entering into a subcontract the Independent Engineer shall ensure that all of the Articles of this Matching Order and the Agreement which contain a requirement for inclusion of such Articles in applicable subcontracts are included within the subcontract (altered when necessary for proper identification of the contracting parties). Prior to the award of any proposed subcontract the subcontractor shall submit the required Organizational Conflicts of Interest disclosures and representations to the DOE Contracting Officer. The Contracting Officer will provide written notice to the Independent Engineer of his/her decision.

Article 48 - Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.

(a) The Government suspends or debars contractors to protect the Government's interests. The Independent Engineer shall not enter into any subcontract or consulting agreement with a

subcontractor or consultant that is debarred, suspended, or proposed for debarment unless there is a compelling reason to do so.

(b) The Independent Engineer shall require each proposed first-tier subcontractor and consultant, to disclose to such Independent Engineer, in writing, whether as of the time of award of the subcontract or consulting agreement, the subcontractor, consultant or any of their principals, is or is not debarred, suspended, or proposed for debarment by the Federal Government.

(c) A corporate officer or a designee of the Independent Engineer shall notify the Contracting Officer, in writing, before entering into a subcontract or consulting agreement with a party that is debarred, suspended, or proposed for debarment. The notice must include the following:

- (1) The name of the subcontractor or consultant;
- (2) The Independent Engineer's knowledge of the reasons for the subcontractor or consultant's being in the Excluded Parties List System;
- (3) The compelling reason(s) for doing business with the subcontractor or consultant notwithstanding its inclusion in the Excluded Parties List System; and
- (4) The systems and procedures the Independent Engineer has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor or consultant in view of the specific basis for the subcontractor or consultant's debarment, suspension, or proposed debarment.

Article 49 - Services of Consultants

Prior to entering into a consulting agreement with a proposed consultant the Independent Engineer will obtain and furnish to the Contracting Officer information concerning the need for and selection of such consultant services. In addition, the Independent Engineer shall comply with the same requirements as identified in **Article 47 - Subcontract Consent**. No work shall be performed by any consultant prior to the Contracting Officer's reviewing and clearing the consultant for any Organizational Conflicts of Interest.

Article 50 - Key Personnel

(a) The Independent Engineer shall assign to this Matching Order the following key personnel:

Name

Title

(b) During the first 90 days of performance, the Independent Engineer shall make no substitutions of key personnel unless the substitution is necessitated by illness, death, or termination of employment. The Independent Engineer shall notify the Contracting Officer within 15 calendar days after the occurrence of any of these events and provide the information required by paragraph (c) below. After the initial 90 day period, the Independent Engineer shall submit the information required by paragraph (c) below to the Contracting Officer at least 15 days prior to making any permanent substitutions.

(c) The Independent Engineer shall provide a detailed explanation of the circumstances necessitating the proposed substitutions, complete resumes for the proposed substitutes, and any additional information requested by the Contracting Officer. Proposed substitutes should have comparable qualifications to those of the persons being replaced. The Contracting Officer will notify the Independent Engineer within 15 calendar days after receipt of all required information of the decision on the substitutions. This Article will be modified to reflect any approved changes of key personnel.

Article 51 - Bankruptcy

In the event the Independent Engineer enters into proceedings relating to its bankruptcy, whether voluntary or involuntary, the Independent Engineer agrees to furnish, by certified mail or electronic commerce method authorized by the Matching Order, written notification of its bankruptcy to the Contracting Officer responsible for administering the Matching Order. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed. This obligation remains in effect until final payment is made under any Matching Order.

Article 52 - Disputes

(1) This Matching Order is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601 - 613).

(2) All disputes arising under or relating to this Matching Order shall be resolved under this Article.

(3) Claim, as used in this Article, means a written demand or written assertion by an Independent Engineer seeking as a matter of right, the non-monetary adjustment or interpretation of contract terms, or other non-monetary relief arising or relating to this Matching Order.

(4) A claim by the Independent Engineer shall be made in writing and must be submitted within six (6) years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against an Independent Engineer shall be subject to a written decision by the Contracting Officer. The Contracting Officer shall render a written decision within 60 days after the request.

(5) If a claim by an Independent Engineer is submitted to the Contracting Officer or a claim by the Government is presented to the Independent Engineer, the parties, by mutual consent, may agree to use alternative dispute resolution ("ADR"). If the Independent Engineer refuses an offer for ADR, the Independent Engineer shall inform the Contracting Officer, in writing, of the

Independent Engineer's specific reasons for rejecting the offer.

(6) The Contracting Officer's decision shall be final unless the Independent Engineer appeals or files suit as provided in the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-603).

(7) The Independent Engineer shall proceed diligently with performance of this Matching Order, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to this Matching Order, and comply with any decision of the Contracting Officer.

Article 53 - Termination for Convenience or Cause

Termination for the Government's Convenience. The Government reserves the right to terminate this Matching Order, or any part thereof, for its sole convenience, including if a Sponsor Payment Letter is not executed or if the Project Sponsor or Borrower fails to make payment of fees and expenses under a Sponsor Payment Letter.

Termination for Cause. The Government may terminate this Matching Order, or any part hereof, for cause or of any default by the Independent Engineer or if the Independent Engineer fails to comply with any Matching Order terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Independent Engineer shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

* * *

Due to the no cost nature of the Matching Order, the Government does not owe the Independent Engineer any amounts due under a Sponsor Payment Letter if the Matching Order is terminated for either cause or convenience. In the event of such termination, the Independent Engineer shall, at the Contracting Officer's notification, immediately stop all work hereunder and shall immediately cause any and all of its consultants/subcontractors to cease work and agree to return all property and material provided by the Government within 30 days of such notification from the Contracting Officer. The termination of a Matching Order shall not automatically discharge any obligations that the parties of the Sponsor Payment Letter may have incurred under the terms and conditions of their Sponsor Payment Letter, and any amounts outstanding in respect of services rendered by the Independent Engineer to DOE prior to the date of such termination by DOE for cause or convenience shall be due and payable to the Independent Engineer by the Project Sponsor and/or Borrower in accordance with the terms of the Sponsor Payment Letter.

Article 54 - Protest After Award

(a) Upon receipt of a notice of protest or a determination that a protest is likely, the Contracting Officer may, by written order to the Independent Engineer, direct the Independent Engineer to stop performance of the work called for by this Matching Order. The order shall be specifically identified as a stop-work order issued under this Article. Upon receipt of the stop-work order, the Independent Engineer shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—

- (1) Cancel the stop-work order; or
 - (2) Terminate the work covered by the stop-work order as provided in the Termination for Convenience or Cause Article of this Matching Order.
- (b) If a stop-work order issued under this Article is canceled either before or after a final decision in the protest, the Independent Engineer shall resume work. The Contracting Officer shall adjust the delivery schedule and the Matching Order shall be modified, in writing, accordingly, if—
 - (1) The stop-work order results in an increase in the time required for the performance of any part of this Matching Order; and
 - (2) The Independent Engineer asserts its right to an adjustment within 30 days after the end of the period of work stoppage.
- (c) If a stop-work order is not canceled and the work covered by the Matching Order is terminated for the convenience or cause, in accordance with **Article 53 - Termination for Convenience or Cause**, due to the no cost nature of the Matching Order, the Government does not owe the Independent Engineer any amounts due under a Sponsor Payment Letter.
- (d) The Government's rights to terminate this Matching Order at any time are not affected by action taken under this Article.
- (e) If, as the result of the Independent Engineer's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this Matching Order is sustained, and the Government pays costs, the Government may require the Independent Engineer to reimburse the Government the amount of such costs.

Article 55 - Additional Requirements for Specific Matching Orders

The Government may include additional provisions or requirements in addition to those included within the Agreement and that are specific to a given Matching Order. Engineering Consultants and Independent Engineers shall be responsible for reviewing each RSCAP and Matching Order.

Attachment A

Statement of Work

DOE will seek advisory services from Engineering Consultants with senior level experience to serve as Independent Engineers. Independent Engineers will advise DOE on various engineering aspects of projects of potential interest to DOE, including, but not limited to, projects in the following energy or energy-related sectors:

- Renewable energy systems, particularly focusing on one or more of the following technologies:
 1. biomass technologies
 2. geothermal technologies
 3. solar technologies
 4. wind and hydropower technologies
- Advanced fossil energy technology, including coal gasification meeting certain Title XVII requirements (e.g., emission levels)
- Hydrogen fuel cell technology (e.g., residential, industrial or transportation applications)
- Advanced nuclear energy facilities
- Carbon capture and sequestration practices and technologies (e.g., agricultural and forestry practice that store and sequester carbon)
- Efficient electrical generation, transmission, and distribution technologies
- Efficient end-use energy technologies
- Production facilities for fuel efficient vehicles (e.g., hybrid and advanced diesel vehicles)
- Pollution control equipment
- Refineries, meaning facilities at which crude oil is refined into gasoline.

The Independent Engineer will assist DOE with respect to these work areas:

Work Area 1 Review of Loan Guarantee Application

- Review and analyze all aspects of the work anticipated to be performed by the Project Sponsors, project company and their contractors for technical and financial merit, as compared to industry best practices. Provide evaluation of viability of proposed projects.
- Review and validate the technology maturity level proposed in a project, particularly with respect to whether the project can meet projected yields, equipment and materials procurement plans and manufacturing replication strategies. Provide an assessment of key engineering and operation risks for the technology proposed in the project.
- Provide an assessment of whether the project's engineering approach and construction methodologies are sufficient to complete the project as envisioned.

- Provide assessment of whether the major project participants have sufficient technical and managerial wherewithal required to complete the project.
- Perform risk analysis including risk identification, risk quantification, risk mitigation, and probability-impact analysis. Develop costs vs. level of confidence curves, review and validate proposed project scheduling using Primavera or equivalent techniques and perform analysis of proposed critical path schedules.
- Provide ongoing support to DOE during the application review process in meetings with and/or related to Project Sponsors, including responding to specific requests for analytical support and review of any sponsor submissions.

Work Area 2 Pre-Construction

- Review and analyze siting and permitting issues, including identification of licenses and permits that the project will need to construct and operate the project. Provide critical path analysis and status reports on siting and permitting issues.
- Perform technical review of plant engineering and design, in accordance with prudent industry standards. Review reliability and efficiency issues, and adequacy of supply and offtake arrangements.
- Review construction contracts, including the engineering, procurement and construction (“EPC”) contract, other contracts including principal sub-contracts, and the milestone schedule.
- Analyze construction and start-up plans, adequacy of planned procurement construction activities and adequacy of project completion tests from the perspective of a financing party (e.g., lender, guarantor).
- Review service agreements, including for performance guarantees, warranty and force majeure issues; determination of insurance requirements; and analysis of factors influencing commercial and final acceptance.
- Review plant operation and maintenance plans; review and analyze all project documents, including offtake agreements, fuel supply agreements, feedstock supply agreements; review and analyze variable and fixed operating cost estimates; and, review and analyze capital expenditures and maintenance programs.
- Review interconnection requirements and arrangements.
- Review decommissioning plans.

Work Area 3 Construction

- Provide monthly project implementation and construction status reports.
- Provide review and analysis of change order requests.
- Identify and report schedule and cost deviations.
- Provide monitoring and certification of disbursements, including review of EPC contractor milestones and drawdown requests.
- Prepare punch lists. Review and report status of punch list items.

Work Area 4 Completion

- Provide certification regarding mechanical completion, provisional acceptance and final acceptance. Certify that DOE's project completion tests have been met. Certify that project has been fully accepted and has entered commercial operation.

Work Area 5 Operation

- Review operation and maintenance plans and procedures.
- Undertake annual reviews of projects for a period commencing after the closing on the loan guarantee agreement and ending on a date to be specified in the Matching Order for the project. Visit plant and report on operations once yearly. Review production, availability, efficiency, environmental compliance, licensing and permitting issues, and details of any major problems. Review and analyze any proposed project modifications.

Attachment B
Sample Sponsor Payment Letter

[SPONSOR LETTERHEAD]

[Date]

[Engineering Firm Name]

[Address]

[City/State/Zip]

Attn.: [Contact]

RE: Sponsor Payment Letter for services in connection with the proposed [Describe project] (the "Project")

Ladies and Gentlemen:

We understand that the Project requires the engagement of Engineering Consultants as Independent Engineers to provide the U.S. Department of Energy ("DOE") with independent technical and engineering advisory services. For these purposes, we understand that DOE has developed a competitive process to select the Independent Engineer to advise DOE on various technical and engineering aspects of projects for which completed loan guarantee applications have been submitted to DOE. We understand that as a result of a competitive selection process, DOE selected your firm as the Independent Engineer for the Project and has issued Matching Order # XXXX.

We, as the borrower and/or project sponsor, will be responsible for paying all fees of and expenses associated with DOE's Independent Engineer. DOE will proceed with evaluating and processing our loan guarantee application only upon our entering into this Sponsor Payment Letter with your firm which has been selected by DOE to provide services to DOE on the Project. DOE may stop work on, or reject, our loan guarantee application if we fail to comply with the provisions of this Sponsor Payment Letter. We acknowledge that the fees and expenses incurred by the Independent Engineer, its subcontractors and consultants in connection with services you and they render to DOE shall only be payable, directly or indirectly through the Independent Engineer, by [Names of the Sponsors] (together the "Project Sponsors," each a "Project Sponsor") and/or the borrower, under all circumstances, without recourse to DOE by the Independent Engineer, any of its subcontractors and/or consultants, Project Sponsor, or borrower. DOE will not be responsible for any of the fees and expenses of the Independent Engineer, its subcontractors and/or consultants, in each case, attributable to representing DOE in connection with the Project, including post-closing issues and DOE requirements, and the Independent Engineer agrees that the Independent Engineer shall look only to us, the Project Sponsor and/or borrower, for payment of such fees and expenses.

Accordingly, as the Project Sponsor and/or borrower, we hereby agree to promptly pay all fees and expenses charged by the Independent Engineer and, as applicable, its subcontractors and/or consultants. We acknowledge our obligation to pay all fees and expenses of the Independent Engineer and, as applicable, its subcontractors and/or consultants, whether or not DOE's loan guarantee for the Project is provided, and/or whether incurred prior to the date hereof, pre-closing or post-closing. We acknowledge that DOE will not be responsible for any fees and expenses incurred by the Independent Engineer, its subcontractors and/or consultants that are related to the Project and that you and your subcontractors and consultants shall have no expectation of payment from DOE for any of the services that you or any of your subcontractors and/or consultants render, or related expenses you, as Independent Engineer, or any of your subcontractors and/or consultants incur in connection with the Project.

As Project Sponsor and/or borrower, we hereby agree to promptly pay all fees and expenses charged by your firm and, upon your request, your subcontractors and consultants. We will pay a retainer to the Independent Engineer in the amount of \$_____ and replenish the retainer upon notification by your firm. Our understanding is that your fees will be based upon your hourly rates as reflected in **Attachment A** and on the time your firm actually devotes to this particular matter as reflected in your invoices.

You will focus your efforts on those tasks required by DOE to achieve its objectives, and that you will closely coordinate your efforts with DOE. In order to afford us the opportunity to confirm that you are working efficiently and coordinating your efforts, we request that you provide DOE statements identifying in detail the work performed by task or document, as applicable, during the relevant period, the total time billed therefore by each employee and by firm, as well as aggregate amounts incurred to date. Upon DOE verification of the completeness and correctness of these statements, we request you submit these statements along with your monthly invoices to us.

We anticipate receiving your monthly invoices. We acknowledge that all fees and expenses represented by such invoices are due on presentation thereof, including at closing, and that the correctness and completeness of the fees and expenses invoiced shall be determined through the statements submitted to and verified by DOE. In addition, please forward all monthly statements and invoices directly to DOE prior to submission to us so that the statements and invoices may be reviewed with a view to possible redaction of privileged or confidential client information.

We understand that notwithstanding our payment obligation to you with regard to the services rendered and expenses incurred as Independent Engineers, the client relationship is solely between DOE, the client and, your firm. There shall be no inference of confidentiality, fiduciary, or other client relationship between your firm and us, the Project Sponsor and/or borrower, as a result of this letter, and we specifically disavow any such relationship with you, as the Independent Engineer. We will also not interfere with DOE's relationship with you.

In addition to engineering fees, we will pay or reimburse you for the expenses listed in

Attachment B that you incur in connection with the Project. We ask that your statements and invoices identify the types of these expenses in reasonable detail.

We acknowledge that this letter shall be subject to review and approval for the purposes of assuring that DOE is not in any way liable for the payment of any fees and expenses. We also acknowledge that the parties to this Sponsor Payment Letter agree that they will not amend, modify, alter, or change in any way this Sponsor Payment Letter without DOE's prior consent.

Please sign and return a copy of this letter to confirm your understanding of, and agreement with, the foregoing.

Very truly yours,

[NAME OF SPONSOR]

By: _____

Name:

Title:

ACCEPTED AND AGREED:

[NAME OF FIRM]

By: _____

Name:

Title:

Attachments

cc: Contracting Officer, U.S. Department of Energy